93-230

No.

In the Supreme Court

OF THE

United States

Supreme Court, U.S.
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OCTOBER TERM, 1993

CHICAGO BRIDGE & IRON COMPANY,
Petitioner,
v.
BOARD OF EQUALIZATION, STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California and the Court of Appeal of the State of California for the Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution is violated by application of the California Use Tax to out-of-state property which is resold to third parties and *never* enters the State of California, where such property (quantifiable scrap steel) was generated as a result of the fabrication, outside the State, of component parts for storage tanks installed in California.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory and Regulatory Provisions	2
Statement of the Case	4
A. Procedural Background	4
B. Factual Background	6
1. Petitioner's Business Operations	6
2. Petitioner's California Contracts	6
3. The Unused Scrap Steel Never Entered The State of California In Any Form	7
4. Petitioner Has Accurately Quantified The Cost Of The Scrap Steel Sold To Local Utah Scrap Dealers	7
5. Petitioner's Position	8
6. Respondent's Position	8
Reasons for Allowing Writ	8
A. The Court of Appeal Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court	8
B. The Court Of Appeal's Decision That California May Apply Its Use Tax To Scrap Steel Generated And Resold Outside The State Conflicts With Established Constitutional Principles As Articulated In The Decisions Of This Court	12

TABLE OF AUTHORITIES

Cases

	Page
American Oil Co. v. Neill, 380 U.S. 451, 14 L.Ed.2d 1, 85 S.Ct. 1130 (1965)	13
Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 73 L.Ed.2d 787, 102 S.Ct. 3103 (1982)	12
Chicago Bridge & Iron Co. v. Johnson, 19 Cal.2d 162 (1941)	9, 10, 11, 12
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 82 L.Ed. 673, 58 S.Ct. 436 (1938)	12, 13, 14
Henneford v. Silas Mason Co., 300 U.S. 577, 81 L.Ed. 814, 57 S.Ct. 524 (1937)	10
Miller Bros Co. v. Maryland, 347 U.S. 340, 98 L.Ed. 744, 94 S.Ct. 535 (1954)	11, 13
Quill Corp. v. North Dakota, 504 U.S. ____, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992)	9, 10
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 93 L.Ed. 2d 449, 107 S.Ct. 499 (1986)	2
Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36 (1905)	14
Wisconsin v. J.C. Penney Co., 311 U.S. 435, 85 L.Ed. 267, 61 S.Ct. 246 (1940)	14

Constitution

United States Constitution, Amend. XIV, § 1	2, 5

TABLE OF AUTHORITIES

Statutes

Page

Statutes

California Code of Regulations, Title 18, Reg. 1521(b)(2)(A) 5
California Code of Regulations, Title 18, Reg. 1521(b)(6)(C) 4, 5, 8
California *Revenue and Taxation Code,* Sec. 6009 3
California *Revenue and Taxation Code,* Sec. 6017 3
California *Revenue and Taxation Code,* Sec. 6091 7
California *Revenue and Taxation Code,* Sec. 6201 ..... 3, 4
California *Revenue and Taxation Code,* Sec. 6933 5
United States Code, Title 28, Sec. 1257(a) 2
United States Code, Title 28, Sec. 2101(c) 2

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Chicago Bridge & Iron Company, respectfully prays that a Writ of Certiorari issue to review the opinion of the California Court of Appeal, Second Appellate District, which affirmed the trial court's ruling that Respondent's (California Board of Equalization) application of the California Use Tax to Petitioner's out-of-state property did not violate the Due Process Clause of the Fourteenth Amendment.

OPINIONS BELOW

A copy of the Opinion and Judgment of the Court of Appeal, dated February 26, 1993, from which this appeal is taken, is reproduced at Appendix "A". A copy of the Order of the Court of Appeal Denying Rehearing, dated March 19, 1993, is reproduced at Appendix "B". Neither the judgment nor the Order on Rehearing were published in either the official or the unofficial reports of California.

A copy of the Order of the California Supreme Court Denying Petition for Review, dated May 18, 1993, is reproduced at Appendix "C". The California Supreme Court's Order was not published in the California reports.

A copy of the Joint Stipulation of Facts filed in the State trial court proceeding, dated May 1, 1990, is reproduced at Appendix "D". A copy of the Judgment of the State trial court, dated June 4, 1990, is reproduced at Appendix "E". Neither of these documents was published.

A copy of Appellant's Notice of Appeal to the State Court of Appeal from the Judgment of the State trial court, filed July 6, 1990, is reproduced at Appendix "F".

JURISDICTION

The Court of Appeal rendered its opinion and judgment on February 26, 1993, affirming the judgment of the California trial court. A Petition for Rehearing was filed March 15, 1993, and was denied by the Court of Appeal on March 19, 1993. Petitioner's Petition for Review by the California Supreme Court was filed April 7, 1993 and was denied by Order dated May 18, 1993. This Petition for Writ of Certiorari is filed within 90 days of that Order as required by 28 U.S.C. § 2101(c).

Absent positive assurance to the contrary from the California Supreme Court, the denial by that Court of the Petition for Review is considered to be a decision on the merits from which an appeal properly lies. *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 138-139, 93 L.Ed.2d 449,460-461, 107 S.Ct. 449 (1986).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The relevant portion of the United States Constitution is the Due Process Clause of the Fourteenth Amendment which provides in pertinent part as follows:

> "... nor shall any state deprive any person of ... property ... without due process of law; ..." [U.S.C.A. Const. Amend. XIV, Sec. 1].

During the years at issue, Section 6201 of the California *Revenue & Taxation Code* provided as follows:

> "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption to this state at the rate of 3 percent of the sales price of the property, and at the rate of 1½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4¾ percent on and after July 1, 1973, and to and including September 30, 1973, and at the rate of 3¾ percent on and after October 1, 1973 and to and including March 31, 1974, and at the rate of 4¾ percent thereafter." [Added Stats. 1972 ch. 1406 § 19, effective December 26, 1972, operative June 1, 1973; Amended Stats. 1973 ch. 67 § 3, effective May 29, 1973, operative July 1, 1973, ch. 2296 § 6, effective August 23, 1973, operative October 1, 1973.]

Section 6009 of California *Revenue & Taxation Code* provides as follows:

> " 'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business." [Added Calif. Stats. 1941, Ch. 36, Section 1, effective July 1, 1943; Amended Stats. 1st Ex. Sess. 1965, Ch. 2, Section 5, effective July 12, 1965, operative August 1, 1965.]

Section 6017 of California *Revenue & Taxation Code* provides as follows:

> " 'In this State' or 'in the State' means within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States of

America." [Added Calif. Stats. 1941, Ch. 36, Section 1, effective July 1, 1943.]

The relevant portion of California Regulation 1521(b)(6)(C), 18 *Cal. Code of Regulations*, provides as follows:

> "A contractor may claim a 'tax paid purchases resold' deduction for any property of which he is the retailer when he has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of it. In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him and to which he has paid sales tax reimbursement or use tax, he may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he sells such short ends or pieces." [Regulation 1521(b)(6)(C), 18 *Cal. Code of Regulations.*]

STATEMENT OF THE CASE

A. Procedural Background

Petitioner timely filed its California Sales and Use Tax returns with Respondent for all quarters of each year in the relevant time period (January 1, 1978 through December 31, 1982). Following an audit of Petitioner's Use Tax returns, Respondent refused to allow Petitioner a full deduction from its California Use Tax base[1] of the cost to Petitioner of scrap steel purchased and resold by Petitioner *entirely outside the State of California* (the "scrap steel").

The parties agreed that because Petitioner was a construction contractor, under California law Petitioner was the consumer for use tax purposes of any material that it furnished and installed inside California in the performance of a construction contract.

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[1] Petitioner's California Use Tax base is the sales price to Petitioner of all tangible personal property used, stored or consumed by it in California. Cal. *Rev. & Tax. Code* § 6201.

Regulation 1521(b)(2)(A), 18 *Cal. Code of Regulations*. The parties disputed the State's unconstitutional *application* of its use tax to Petitioner's out-of-state property and the resulting improper computation of the cost base upon which Petitioner's California Use Tax was to be computed.

Petitioner paid the full amount of the tax deficiency assessed as a result of Respondent's recomputation of Petitioner's Use Tax base and then filed claims for refund with Respondent for recovery of the additional California Use Tax paid.

Respondent denied Petitioner's refund claims, disagreeing with Petitioner's contention that Respondent's refusal to reduce Petitioner's California Use Tax base by the dollar amount of the cost to Petitioner of scrap steel that was bought and sold outside the State of California and never used in any manner or for any purpose inside the State was contrary to the Due Process Clause and not supported by California law. Respondent argued that the reduction of Petitioner's California Use Tax base as a result of the sale by Petitioner of scrap steel generated outside the State of California to third-parties also outside the State of California was limited to the dollar amount that Petitioner realized in sales to these out-of-state dealers. The Board cited the "short-ends" rule of Regulation 1521(b)(6)(C), 18 *Cal. Code of Regulations*.

Petitioner then sued for recovery of California Use Tax pursuant to California *Revenue & Taxation Code* § 6933. After the parties filed concurrent motions for summary judgment, the trial court entered an order granting Respondent's motion and denying Petitioner's.

Petitioner appealed from the trial court's order. The Court of Appeal affirmed the judgment of the trial court and denied Petitioner's Petition for Rehearing. The California Supreme Court then denied Petitioner's Petition for Review of the Court of Appeal judgment.

Petitioner raised the federal question of whether Respondent's application of the use tax to Petitioner's out-of-state property violated the Due Process Clause of the Fourteenth Amendment in its complaint for recovery of California Use Tax. In its Order

granting Respondent's Motion for Summary Judgment, the California trial court did not address the Constitutional issue.

Petitioner raised the due process issue again on appeal, but was given short shrift in the Appellate Court's decision:

> "We summarily reject [Petitioner's] contention that the [Respondent's] reliance on Regulation 1521(b)(6)(C) to support its application of a use tax in this case deprives [Petitioner] of its due process rights. Aside from the fact that the regulation benefits [Petitioner] by creating a *deduction* for scrap resale proceeds, it is absolutely consistent with the Supreme Court's interpretation of the statute. [Respondent] is relying on the statute, as interpreted by the courts, not on a regulation." *Chicago Bridge & Iron Co.*, No. BO51542, Slip Op. at 9.

B. Factual Background

The parties do not dispute the relevant facts which are contained in the Joint Stipulation of Facts (Exhibit "D"). These facts are summarized as follows:

1. Petitioner's Business Operations

Petitioner is, and at all times material here was, an Illinois corporation whose principal headquarters and place of business are in Oak Brook, Illinois. During the relevant time period (January 1, 1978 through December 31, 1982), Petitioner was qualified to do business in the State of California and performed some of its business operations there.

Petitioner's principal business operations and activities during this period consisted of the design, engineering, manufacture and field installation of large steel plate storage tanks, for the processing and storage of petroleum products, chemicals and other liquids.

2. Petitioner's California Contracts

Petitioner performed a number of contracts in California that required the on-site installation of large storage tanks. Except for the actual installation of these tanks at the field sites in California,

most, if not all, of the services performed by Petitioner in connection with these California construction contracts were rendered at Petitioner's fabrication plant in Salt Lake City, Utah.

3. The Unused Scrap Steel Never Entered The State of California In Any Form

Notwithstanding Petitioner's efforts to minimize its costs by reducing unused steel plate, a certain amount of unused steel plate necessarily resulted from the cutting, rolling and manufacture of subassemblies which, when assembled, made up the storage tanks installed at various construction locations in California.

That portion of the unused steel treated by Petitioner as scrap steel was later sold by Petitioner to local Utah scrap dealers[2] and constitutes the subject matter of this dispute. *The scrap steel at issue here was neither purchased nor sold, nor used, stored or consumed in California.*

4. Petitioner Has Accurately Quantified The Cost Of The Scrap Steel Sold To Local Utah Scrap Dealers

It is undisputed that Petitioner has accurately determined the cost of the scrap steel. The cost of the scrap steel is precisely computed by substituting from the total volume of material purchased *outside* the State of California the exact weight of the subassemblies exported from the Utah plant to various California construction sites. The cost of the scrap steel is then determined by multiplying the weight of the scrap steel which remained at the Utah plant by the actual cost per pound of the material.

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[2]Petitioner's sales to local Utah scrap dealers were not taxable transactions since they were not "retail sales" as that term is defined in Calif. *Rev. & Tax. Code* § 6091. Petitioner received resale certificates from the Utah scrap dealers establishing that the scrap steel was purchased for resale. Whenever the scrap steel was eventually sold at retail it was subject to the pertinent sales or use tax, but that transaction is irrelevant here.

5. Petitioner's Position

Petitioner contends that its method of ascertaining the cost of materials actually imported into the State of California accurately reflects its true cost of the materials stored, used or consumed within the state. Petitioner contends further that, based upon its ability to accurately compute the cost to it of materials actually stored, used or consumed in the State of California, and based upon its purchase and resale of scrap steel wholly outside the State of California, Petitioner's California Use Tax base should be limited to the actual cost to Petitioner of materials used, stored or consumed in the state. Obviously such materials do not include the out-of-state scrap steel.

6. Respondent's Position

Respondent contends, on the other hand, that the California "short-ends" Regulation 1521(b)(6)(C), 18 *Cal. Code of Regulations*, applies to the resale by Petitioner of scrap steel to third-party scrap dealers outside the State of California and thus Petitioner's California Use Tax base should include the cost of material that never enters the state reduced only by its resale value.

REASONS FOR ALLOWING WRIT

A. The Court of Appeal Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

The California Court of Appeal has held that the State of California may, without violating the Due Process Clause of the Fourteenth Amendment, impose its use tax upon out-of-state property that never enters the State. *Chicago Bridge & Iron Co.*, No. BO51542, Slip Op. The Appellate Court's decision is a matter of first impression which has not been, but should be, settled by this Court. If not reversed, the decision would undercut the protection afforded taxpayers by the Due Process Clause, both because of the uncertainty it would spawn and because of the costs it would impose without warning.

The decision below has significance beyond the borders of California and far beyond the liability of an out-of-state construction contractor for use tax on out-of-state property. It potentially affects the ability of all businesses — no matter where located — to compute their cost of doing business out-of-state and therefore to competitively engage in interstate commerce. The spurious reasoning of the Appellate Court's decision encourages an unprecedented expansion of the Due Process Clause insofar as it would permit a State to tax property outside its taxing jurisdiction.

The Court of Appeal fails to cite any authority of this Court in support of its ruling. It relies solely upon the California Supreme Court decision of *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162 (1941) but does so in error. The *Johnson* decision does not dispose of or even address the question presented here.

This Court has addressed the question whether a State may require an out-of-state seller to collect and pay a use tax on goods purchased for use within the State (*See, e.g., Quill Corp. v. North Dakota*, 504 U.S. ____, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992)), but that issue is altogether different from the question presented here. *Quill* and its predecessors dealt with whether State regulatory jurisdiction could be asserted against an out-of-state seller based upon that seller's physical presence or lack thereof in the taxing State. The Court determined in *Quill* whether North Dakota's use tax could be imposed against an out-of-state mail-order house that had neither outlets nor sales representatives in North Dakota. Using reasoning comparable to that contained in its post-1967 cases dealing with state jurisdiction to adjudicate, the Court held that the Due Process Clause does not require the physical presence of the seller in a State for the State to impose the duty of use-tax collection.[3] *Quill*, 504 U.S. at ____, 119 L.Ed.2d at 103, 104, 112 S.Ct. 1904.

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[3]Although the Court concluded in *Quill* that the Due Process Clause does not bar a state from imposing its use tax upon a seller whose only connection with the State is through common carrier or the United States mail, it found that the State's enforcement of the use tax against the out-of-state seller placed an unconstitutional burden on interstate

The question presented here represents the flip-side to *Quill* and its predecessors. This case does not concern a link or minimum connection between the taxing state (California) and the out-of-state taxpayer (Petitioner). Petitioner does not dispute that it qualified to carry on an interstate business in California, or that it purposefully availed itself of the benefits of California's economic market. Rather, this case involves the proper composition of the tax base which serves as the measure of California's use tax and whether California has unconstitutionally subjected Petitioner's property to extraterritorial taxation in violation of the Due Process Clause by including in that use tax base value attributable to property (the scrap steel) which has never been stored, used or consumed within California's borders.

Thus the specific question presented here has never been settled by this Court. This Court has addressed whether sufficient contacts exist between a *taxpayer* and a State to satisfy the "nexus" requirements of the Due Process Clause (*Quill* and its predecessors), but it has never determined the extent to which those contacts must exist between the *property* to be taxed and a State to satisfy due process concerns. Specifically, this Court has never addressed whether the Due Process Clause bars application of a State's use tax to out-of-state property that never enters the State, where such property is purchased out-of-state along with other materials which are subsequently used to construct finished products (storage tanks here) which come to rest in the taxing state.

This is similarly a case of first impression in California. The Court of Appeal contends that the California Supreme Court's decision in *Johnson* is dispositive of the question presented here

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commerce. The Commerce Clause is not at issue here since it is not disputed that the use tax may be levied on things acquired or transported in interstate commerce once they are at rest and have become part of the common mass of property within the state of destination. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582, 81 L.Ed. 814, 818 57 S.Ct. 524 (1937). The scrap steel at issue never entered or came to rest in California at any time, hence Petitioner focuses on the Due Process Clause, which *Quill* noted is subject to its own distinct test. *Quill*, 504 U.S. at ____, 119 L.Ed. at 102, 1125 S.Ct. 1904.

and that *Johnson* "expressly rejected" Petitioner's argument that it can only be taxed on property that is used, stored or consumed in California. *Chicago Bridge & Iron Co.*, No. BO51542, Slip Op. at 5, n. 2. But the Court of Appeal is wrong.

The decision below misreads *Johnson* which held only that the California Use Tax applies to materials stored in California just prior to and during their installation there. *Johnson*, 19 Cal.2d at 167. *Johnson* did not address whether the use tax would similarly have applied if the materials had never entered the State. Yet the Court of Appeal infers from *Johnson* that property which never enters the State should nevertheless be included in the use tax base so long as that property is initially purchased with other materials used to construct storage tanks in the State.[4]

Although *Johnson* involves both the same taxpayer as this case and a use tax issue, it is not analogous. Whereas in *Johnson* Petitioner argued (incorrectly) that the use tax should not have been applied to property it conceded was stored in California because that property was only manufactured and not purchased by it (*Johnson*, 19 Cal.2d at 167, 170),[5] Petitioner argues here that *the use tax should not be applied to property that is conceded by both parties never to have entered the State at all.*

Contrary to the Appellate Court's assertion, *Johnson* did not reject (or even address) the venerable principle at risk here: that due process requires a "definite link, some minimum connection, between a state and the ... property ... it seeks to tax." *Miller*

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[4]The Court of Appeal further misreads *Johnson* when it claims that the regulation at issue (1521 (b)(6)(c)) "benefits [Petitioner] by creating a deduction for scrap resale proceeds." *Chicago Bridge & Iron Co.*, No. B051542, Slip Op. at 9. Rather than "creating" a deduction from Petitioner's use tax base, the regulation, as *applied* by Respondent, unconstitutionally *limits* a deduction (on account of the cost to the Petitioner of the scrap steel) to which Petitioner would otherwise be entitled.

[5]Since the *Johnson* decision, Petitioner has paid use tax without argument on all materials used, stored or consumed by it in the State regardless of whether Petitioner purchased or manufactured those materials.

Bros Co. v. Maryland, 347 U.S. 340, 344-345, 98 L.Ed. 744, 94 S.Ct. 535 (1954). Conspicuously absent from the decision below is the following statement from *Johnson* (at 170) which should have removed any ambiguity as to whether the California Supreme Court "expressly rejected" Petitioner's argument that it can only be taxed on property used, stored or consumed in the State:

> "The tax was levied on the storage and use of materials which were purchased and fabricated into the tank parts, *that storage and use consisting of the time after the materials had arrived [in California]* . . . . That was the commencement of the taxable moment; that was the taxable intrastate event which occurred after the interstate transit had ceased." (emphasis added)

Here, no "taxable intrastate event" ever occurred because "interstate transit" of the scrap steel, from Utah to California, never took place.

That the Court of Appeal was unable to distinguish the issues raised in *Johnson* from those raised in the present case only reinforces the need for this Court to provide clarity on this important Constitutional question. Although the *Johnson* decision is not inconsistent with Petitioner's position, it does not address whether the State's application of the California Use Tax to out-of-state property violates the Due Process Clause. If the Appellate Court's decision is allowed to stand absent this Court's review, California and other states may continue expanding the reach of the use tax to extraterritorial property, thereby undermining the Due Process Clause.

B. The Court Of Appeal's Decision That California May Apply Its Use Tax To Scrap Steel Generated And Resold Outside The State Conflicts With Established Constitutional Principles As Articulated In The Decisions Of This Court

That a State may not tax value earned outside its borders is an established principle of constitutional law. *Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315, 73 L.Ed.2d 787, 794, 102 S.Ct. 3103 (1982); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 81-81, 82 L.Ed. 673, 58 S.Ct. 436 (1938). The Due

Process Clause requires some "definite link, some minimum connection, between a state and the . . . property . . . it seeks to tax." *Miller Bros. Co.*, 347 U.S. at 344-345, 98 L.Ed. 744, 74 S.Ct. 535.

Here, the failure of the scrap steel ever to enter California belies a "link" or "minimum connection" between California and Petitioner's alleged "use" of the scrap steel in California. While it is conceded that Petitioner qualified to and did carry on an interstate business in California, thus establishing a nexus between the State and Petitioner, the Constitutional analysis does not end there. This Court has held that even when a nexus exists between the State and the taxpayer, if the State fails to otherwise comply with the requirements of due process, then the nexus between the State and the taxpayer is fortuitous and the State may not tax or otherwise burden transactions that are entirely disassociated from the local business. *American Oil Co. v. Neill*, 380 U.S. 451, 458-59, 14 L.Ed.2d 1, 85 S.Ct. 1130 (1965); *see also Connecticut General*, 303 U.S. at 80-81, 82 L.Ed. 673 ("a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the Due Process Clause denies to the State power to tax or regulate the corporation's property and activities elsewhere").

The scrap steel bought and sold by Petitioner outside the State is wholly beyond the reach of California's sovereign power. It is a transaction that California cannot effectively command without running afoul of the Due Process Clause:

> "No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction . . . . If the legislature of a State should enact that the . . . property of another State . . . should be taxed in the same manner as the . . . property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." *Miller Bros. Co.*, 347 U.S. at 342, 98 L.Ed. 744, 74 S.Ct. 535.

Respondent may argue that the decision below does not conflict with prior decisions of this Court; that the issue here is simply one of statutory construction; and that the scrap steel was effectively used or consumed in California because it was generated, albeit out-of-state, as a result of fabricating activities associated with the performance of contracts involving California destinations. But any attempt to limit this case to a question of statutory interpretation obfuscates the practical effect of the State's application of the use tax to these facts: the operative reach of the use tax statute as applied embraces extraterritorial property and therefore violates the Due Process Clause. *See Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 195, 204, 210, 50 L.Ed. 150, 153, 156 (1905) (it is "essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power;" and "the adoption of a general rule that tangible personal property in other states may be taxed at the domicile of the owner involves possibilities of an extremely serious character").

This Court has held that when passing on the Constitutionality of a State taxing scheme its primary concern is with the practical operation of the tax — substance rather than form. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-444, 85 L.Ed. 267, 270, 61 S.Ct. 246 (1940). A determination of the ultimate effect of the law as applied and enforced by the State is required. *Connecticut General Life Ins. Co.*, 303 U.S. at 80, 82 L.Ed. 673, 58 S.Ct. 436. Here, the ultimate and practical effect of both the State's application of its use tax and the affirmation of that application by the decision below is to permit the State of California to violate the Due Process Clause by taxing property wholly outside its jurisdiction.

DATED: August 11, 1993

Respectfully Submitted,

By DENNIS A. PAGE
JOHN M. GARRICK
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CHICAGO BRIDGE & IRON
COMPANY

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHICAGO BRIDGE & IRON COMPANY,
Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION,
Defendant and Respondent.

B051542
(Super. Ct. No. C712283)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey A. Schneider, Judge. Affirmed.

Dennis A. Page and John M. Garrick, for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Edmond B. Mamer, Supervising Deputy Attorney General, and David S. Chaney, Deputy Attorney General, for Defendant and Respondent.

Chicago Bridge & Iron Company (CB&I) sued the Board of Equalization of the State of California for a use tax refund. The trial court granted the Board's motion for summary judgment and CB&I appeals. We affirm.

FACTS

Between 1978 and 1982, CB&I (an Illinois corporation which designs and manufactures steel storage tanks) had several jobs requiring on-site installation in California. To perform those contracts, CB&I obtained standard-size steel plates from a non-California manufacturer and had the plates shipped directly to CB&I's fabricating plant in Utah. CB&I cut and shaped the plates into component parts (all the work was done in Utah) and

sold the remaining scrap metal to Utah scrap dealers. The tanks were then assembled and installed at the field sites in California.

CB&I timely filed California use tax returns for calendar years 1978 through 1982, reporting steel costs for its California contracts as the cost of the portions of the steel used in the finished tanks erected in California (and not including the portions cut away during construction in Utah and sold to Utah scrap dealers). It was (and is) CB&I's position that it ought not to pay a use tax on its cost for residual metal which was never used in California. Following an audit, the Board concluded that CB&I should have reported the total amount paid for all steel purchased for the California contracts, reduced only by the amount recouped from the sale of any scrap. Additional use taxes and penalties were assessed against CB&I.

CB&I paid the deficiency and, following denial of its request for a refund, filed suit against the Board. Cross-motions for summary judgment resulted in a determination by the trial court that the Board's position was correct and CB&I appeals from the judgment thereafter entered.

DISCUSSION

I.

We reject the Board's assertion that CB&I is collaterally estopped from litigating the issues raised in this case because identical issues were raised in a prior action in which the judgment is final (*Chicago Bridge & Iron Co.* v. *State Board of Equalization*) (B028787) abandonment filed Sept. 18, 1990). (See *Producers Dairy Delivery Co.*, v. *Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910; *People* v. *Sims* (1982) 32 Cal.3d 468, 484.) Our review of the record in the prior action (pursuant to the Board's request for judicial notice) reveals there was no final judgment until three months after judgment was entered in this case. We thereafter decide this case on its merits.

II.

CB&I contends it has accurately determined the steel costs for its California contracts by computing the weight of the steel and reporting for California use tax purposes the cost of that portion of the steel actually used for subassemblies which were then installed at California construction sites. Stated otherwise, CB&I takes the position that it ought to be taxed in California for only that portion of the material actually installed in the state, notwithstanding that more material (the cut-away sections sold for scrap) was ordered specifically for the California contracts. The Board contends CB&I is required to report its total cost for the steel purchased for the California contracts, reduced only by the amount received by CB&I as payment from scrap dealers. We agree with the Board.

A use tax is an "excise tax . . . imposed on the storage, use, or other consumption in this state on tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state . . ." (Rev. & Tax. Code, § 6201).[1] Use taxes were first levied under the California Use Tax Act of 1935 (Stats. 1935, ch. 361, § 3, pp. 1298-1299) and, coincidentally, one of the first challenges to the statute was pursued by CB&I.

In *Chicago Bridge & Iron Co. v. Johnson* (1941) 19 Cal.2d 162, CB&I claimed it was not liable for any use tax at all because it did not purchase tanks for storage or use in California but merely manufactured them.[2] Our Supreme Court disagreed, explaining

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[1]All section references are to the Revenue and Taxation Code and all regulation references are to the California Code of Regulations.

[2]The nature of CB&I's business has not changed very much in the last 50 years. In 1941, the Supreme Court explained that CB&I purchased steel outside of California, manufactured the raw materials into tank component parts at its plants outside of California, and assembled and installed those parts at their California destinations. (*Chicago Bridge & Iron Co. v. Johnson, supra,* 19 Cal.2d at pp. 163-164.) And the substance of the applicable statute has not changed. The original Use Tax Act provided that "[a]n excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal

that the tax was based on CB&I's use in California of the materials it purchased elsewhere. "It acquired the raw materials out of which it manufactured or fabricated those completed parts, and it is the storage and use of those materials upon which the tax is based. *The tax was computed upon the cost, that is, the sales price of these materials to [CB&I], and that is the price which it paid for them. The fabrication and construction of these materials into the completed articles undoubtedly enhanced their value, but the tax is not calculated on that value. It is based on the sales price to [CB&I] of the materials which were used to fabricate the finished product which materials were undeniably purchased by [CB&I].*" (*Id.* at p. 167, emphasis added.)

In apparent anticipation of the argument CB&I asserts today (that it can't be taxed for that portion of property which is not actually "used" in California), the Supreme Court went on to explain that "those materials which were purchased by [CB&I] to fabricate tanks specifically to fulfill contracts or orders for tanks in California, were purchased for use, storage or other consumption in this state. *Those materials were designed for the purpose of being used by [CB&I] to erect tanks on its customer's premises in California in compliance with its contractual obligation.* To say that in ascertaining whether the tax applies, one may not look through the fabrication or manufacture to the purchase of materials used in that process and conclude that such purchase was for storage or use in California, is to sacrifice substance for form. The true reason and purpose for purchasing the materials was not merely the fabrication thereof into tanks.

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property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State . . . ." (Stats. 1935, ch. 361, § 3, pp. 1298-1299.)

The only thing that has changed is CB&I's argument, but not very much. Instead of focusing on the word "manufacture" as it did in 1941, CB&I now focuses on the word "used" and contends it can only be taxed on property "used" in the State of California, an argument expressly rejected in *Chicago Bridge & Iron Co. v. Johnson, supra*, 19 Cal.2d 162. The somewhat incredible failure of both parties to even mention *Chicago Bridge & Iron Co. v. Johnson* may explain the redundancy.

"In regard to the portion of materials purchased by [CB&I] and retained as stock in its plants outside this state to be used in the construction of tanks as its business might require, it is clear that in order that the object and purpose of the Use Tax Act may not be frustrated, it must be concluded that they were subject to the use tax. Those materials were purchased for use, storage or other consumption in this state. While it is true that they were not acquired with the express purpose of performing any specified contract or order, [CB&I] was engaged in the business of selling and constructing tanks in California. . . ." (*Id.* at p. 168, emphasis added.)

In *Chicago Bridge & Iron Co. v. Johnson*, there remained a possibility that the excess material might someday be used by CB&I on another California job. (*Id.* at p. 169.) Although the parties' failure to cite or discuss that case means they have not addressed the factual distinction in this case — here the scrap was sold to a Utah dealer, not stored, eliminating the possibility that CB&I might bring it into California — we are satisfied that the distinction is one without a difference. To assert on this appeal that sale of the scrap in Utah destroyed the contingency relied on by the Supreme Court, CB&I would have had to prove in the trial court that, at the time it purchased the steel, it intended to use it outside of California. And it would not have been enough to show that it had no intention of using the scrap in California because, by the nature of CB&I's business, there would have remained the possibility that it might sometime be used here. (*Western Contracting Corp.* v. *State Board of Equalization* (1968) 265 Cal.App.2d 568, 575.)

As the court explained in *Western Contracting Corp.*, "[w]ere the rule otherwise a company that operates in many states could avoid the payment of use tax in any state by demonstrating that it had not decided in which state to use the purchased products at the time of the purchase." (*Ibid.*) Accordingly, CB&I had the burden to prove not only that the Board's assessment was wrong but also to prove the basis for a correct assessment (*People* v. *Schwartz* (1947) 31 Cal.2d 59, 64-66) and its failure to present proof of its intent at the time of purchase (as well as its failure to

assert this position on appeal) defeats its attack on the Board's determination.

It follows that the Board correctly computed CB&I's use tax base as the cost of the steel purchased by CB&I for the California contracts, reduced only by the amounts received by CB&I for scrap sales. This result is consistent not only with existing interpretations but also with the purpose of the use tax — to place local retailers, who must pay a sales tax computed as a percentage of gross receipts on all retail sales (§ 6051; *Lockheed Aircraft Corp.* v. *State Bd. of Equalization* (1978) 81 Cal.App.3d 257, 265), on an equal footing with their out-of-state competitors who are not required to pay sales tax. (*Burroughs Corp.* v. *State Bd. of Equalization* (1984) 153 Cal.App.3d 1152, 1159.)

As the Court explained in *Chicago Bridge & Iron Co.* v. *Johnson, supra*, 19 Cal.2d at p. 165, if the materials were purchased in California and used in a plant maintained here for the manufacture of tanks, the sale of the materials to CB&I would be subject to the California sales tax. If the complete coverage and complementary nature of the sales tax and the use tax are to be preserved, it must be true that the materials are subject to use tax when purchased and fabricated elsewhere even though their form may be altered by the reason of the fabrication.

III.

We summarily reject CB&I's contention that the Board's reliance on Regulation 1521(b)(6)(C) to support its application of a use tax in this case deprives CB&I of its due process rights. Aside from the fact that the regulation benefits CB&I by creating a *deduction* for scrap resale proceeds, it is absolutely consistent with the Supreme Court's interpretation of the statute. The Board is relying on the statute, as interpreted by the courts, not on a regulation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

SPENCER, P.J.

ARANDA, J.*

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*Assigned by the Chairperson of the Judicial Council.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 02/26/93

IVERSON, YOAKUM, PAPIANO & HATCH
JOHN M. GARRICK
624 So. Grand Ave.
27th Floor
Los Angeles, CA 90017 3328

RE: Chicago Bridge & Iron Co.
vs.
Board of Equalization
2 Civil B051542
Los Angeles NO. C712283

OFFICE OF THEE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 1 DATE: 03/19/93

IVERSON, YOAKUM, PAPIANO & HATCH
JOHN M. GARRICK
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27th Floor
Los Angeles, CA. 90017 3328

RE: Chicago Bridge & Iron Co.
vs.
Board of Equalization
2 Civil B051542
Los Angeles NO. C712283

THE COURT:
Petition for rehearing denied.

Second Appellate District, Division One, No. B051542
S032122

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

CHICAGO BRIDGE & IRON COMPANY,
Appellant

v.

STATE BOARD OF EQUALIZATION,
Respondent

Appellant's petition for review DENIED.

LUCAS
Chief Justice

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CHICAGO BRIDGE & IRON COMPANY
a corporation,
Plaintiff,
vs.
BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,
Defendant.

Case No. 712283

JOINT STIPULATION OF FACTS

Hearing
Date: May 3, 1990
Time: 8:30 A.M.
Place: Department 52

TO DEFENDANT BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA AND ITS ATTORNEY OF RECORD:

On behalf of itself and defendant and in furtherance of both parties' motions for summary judgment, plaintiff Chicago Bridge & Iron Company submits the following Stipulation of Facts.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
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CHICAGO BRIDGE & IRON COMPANY
a corporation,

Plaintiff,

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,

Defendant.

Case No. 712283

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective counsel of record, that, for the purpose of trial in this complaint for recovery of California Use Tax, the facts stated in this Stipulation are undisputed and may be treated by the Court as facts proved in open court.

The parties may on the trial of this action call witnesses and offer evidence, or may stipulate to additional facts, for the purpose of proving such additional facts as the parties may see fit.

The undisputed facts are as follows:

1. Defendant Board of Equalization of the State of California ("Defendant Board") does not take issue with the figures and other primary accounting data from which plaintiff Chicago Bridge & Iron Company ("CB&I") derived its California Use Tax base and resulting liability. Rather, the dispute between the parties centers on the application of the law to CB&I's particular factual situation and the determination of the cost base upon which CB&I's California use tax is to be computed. (For purposes of this stiuplation, the term "California Use Tax base: shall be defined as the sales price to CB&I of all tangible personal property purchased or withdrawn from inventory for use in performing construction contracts in California.) Thus, to the extent that a resolution of the correct tax base is reached, the computation of the California use tax is straightforward and is not disputed. Once this determination is made, then, the parties are prepared to agree as to the correct amount of tax.

2. As set out in greater detail below, if the "short-ends" rule of California Administrative Regulation 1521(b)(6)(C) does not legally apply to the residual metal generated by CB&I at its Salt Lake City, Utah fabrication plant, in connection with the underlying fabrication of materials for contracts involving a field erection site in California, then CB&I is entitled to a refund in the amount of $191,469.97 on account of overstated California use tax, and $6,572.24 on account of penalties paid by CB&I to Defendant Board, together with interest as provided by law.

3. At all times material herein, CB&I was an Illinois corporation whose principal headquarters and place of business was and is located in Oak Brook, Illinois. During the period in issue, CB&I was qualified to do business in the State of California and performed business operations in the State of California.

4. CB&I's principal business operations and activities during the period in issue involved the design, engineering, fabrication, manufacture and field erection of large welded steel plate storage

tanks, nuclear containment vessels, blast furnaces, and other steel plate structures for the processing and storage of petroleum products, chemicals, and other liquids.

5. Defendant Board is and was at all times material herein the agency of the State of California charged by law pursuant to *California Rev. & Tax Code* § 7051 with the responsibility to administer and enforce the California Sales and Use Tax law, *Rev. & Tax Code* § 6001, *et seq.*

6. Defendant Board also administers the Uniform Local Sales & Use Tax Law, *Rev. & Tax Code* § 7202(d), and the Transactions and Use Tax Law, *Rev. & Tax Code* § 7270. In this capacity, Defendant Board is authorized and empowered to assess and collect use taxes on behalf of the State of California and to audit and examine sales and use tax returns filed with the State of California pursuant to the California Sales & Use Tax Law, the Uniform Local Sales & Use Tax Law, and the Transactions and Use Tax Law.

7. The subject matter of this action involves a determination of the correct amount of use taxes that should have been paid by CB&I to the State of California during the period from January 1, 1978 through December 31, 1982, inclusive (hereinafter sometimes referred to as the "years 1978 through 1982"), pursuant to the California Sales & Use Tax Law, *Rev. & Tax Code* §§ 7200-7209, and the Transactions and use Tax Law, *Rev. & Tax Code* §§ 7251-7273, and includes the Bay Area Rapid Transit District (BART) tax imposed by selected Northern California Counties at the rate of ½ of 1% during the period in issue.

8. CB&I brings this action against Defendant Board under the authority of Sections 6933 and 6934 of the *California Rev. & Tax Code.* Jurisdiction of this action, which involves among other things the legality of a tax, is vested in the Superior Court by virtue of *California Code of Civil Procedure* § 86(a)(1) and California Constitution Article VI, Section 10.

9. During the period in issue, CB&I performed a number of real property improvements ("construction contracts" or "contracts") that required the erection or emplacement at sites within the State of California of tanks, vessels, or other large contain-

ment structures ("containment structure(s)"). Except for contracts filled from CB&I's Fontana, California plant and work performed in connection with the actual erection or emplacement at the field sites of containment structures, most of the services performed by CB&I in connection with such contracts were rendered outside the State of California. Contracts filled from CB&I's Fontana plant are not the subject of this refund action.

10. CB&I was a construction contractor and not a seller of tangible personal property. Accordingly, California Administrative Regulation 1521(b)(2)(A)1 establishes that CB&I was the consumer of any material that it furnished and installed in the performance of a construction contract. As the consumer, CB&I was liable for California use tax measured by the sales price to CB&I of materials incorporated into the finished structures. CB&I was not entitled to pass this tax onto its customers in the form of a separately stated charge. Thus, CB&I's payment of such use tax constituted a cost and, like all other costs to CB&I was included in the lump-sum construction contract price. Any additional use tax liability, such as that proposed by defendant Board, is paid solely by CB&I and is not passed on to its customers.

11. A significant portion of the services necessary to fulfill CB&I's construction contracts were performed at its fabrication plant in Salt Lake City, Utah where steel plate was cut, rolled and fabricated into component parts ("subassemblies") which, when assembled, constituted the containment structures erected at various construction locations in California and throughout the western United States.

12. CB&I prepared its lump-sum construction contract price quotations by determining its steel costs based upon the tonnage of steel that would be incorporated into the final containment structure. CB&I purchased the component steel used at its Utah fabrication plant from various steel mills (herein predominately Geneva Steel) on a price-per-pound basis from published steel mill lists. The material cost estimate was based on tonnage times the established price. At the bid formation stage, CB&I projected, with as much accuracy as possible, its steel cost along with all other costs attributable to the performance of a particular construction contract.

13. CB&I ordered most of its steel for a specific containment structure after a contract had been awarded. These orders were customized in terms of specific widths and lengths in order to suit the specific design and structural requirements of a particular contract. The volume of residual steel produced was inversely related to the accuracy with which the steel ordered by CB&I suited the structural requirements of a contract: the more nearly suited the steel was to the contractual requirements, the less the amount of residual steel produced. In turn, a reduction in the volume of residual steel produced resulted in a proportionate reduction in CB&I's fabrication costs.

14. For purposes of cost accounting, CB&I identified steel plate ordered for specific contracts as "contract metal". CB&I used contract metal primarily for the ring or wall plates of containment structures for which exact thicknesses and grades were essential. CB&I purchased contract metal directly from steel mills as a *commodity* on a unit price per pound basis. Contract metal was specifically earmaked from the time of purchase until the completion of the fabrication process for use on a particular contract. At all times during the fabrication process, CB&I accounted for contract metal separately, never commingling it with CB&I's stock inventory ***unless*** reusable residual metal, such as that described in Paragraph 18 of this Stipulation, resulted from the fabrication process, in which case such residual metal was returned to inventory.

15. In addition to contract metal, CB&I also maintained an inventory of steel plate that was separately identified as stock metal".

16. Stock metal consists of steel plates that had a common size and thickness and that were capable of being used on a number of different projects. Typically, stock metal was used for the bottoms and roofs of the standard flat-bottom and cone-roof style tanks. Because stock metal was part of CB&I's working inventory, it was not ordered in connection with the performance of a particular contract.

17. CB&I did not pay a use tax to the State of Utah on any contract metal that had been ordered by CB&I for a specific

contract involving a field erection site in the State of California. However, CB&I typically paid use tax to the State of Utah on all of its stock metal inventory purchased for its fabricating plant in Salt Lake City, Utah. With respect to CB&I's California use tax liability for the period in issue, CB&I claimed and received from Defendant Board a credit with respect to the use taxes previously paid by CB&I to the State of Utah, as permitted by *Rev. & Tax. Code* § 6406. This credit has not been challenged and is not at issue in this action.

18. Notwithstanding CB&I's efforts to minimize its costs by reducing scrap and otherwise unused steel plate, a certain amount of steel plate (residual metal) remained after the fabrication process as a result of the cutting, rolling and manufacture of the component subassemblies. Based on the size, dimensions and general condition of the residual metal, CB&I then determined whether to treat the left over material as scrap or set it aside and return it to stock for use on another contract. Residual metal treated as scrap was later sold by CB&I to local Utah scrap dealers and the SBE's reliance on the sale of such scrap to aid in the determination of the measure of use tax is the subject matter of this dispute. Residual metal returned to stock for use on another contract was valued by CB&I for material-cost-estimate purposes in accordance with the then market price of steel plate.

19. Any residual metal not returned to stock by CB&I was typically resold to local Utah third-party purchasers. CB&I did not erect, ship or sell such residual metal into the State of California.

20. CB&I arrived at the percentage of metal purchased and sold outside the State of California by computing the total weight of steel imported into the Utah fabrication plant less the weight of the steel plate subassemblies exported from the plant to various California job site locations. Quarterly reports were generated since CB&I sold its residual metal to Utah purchasers on a quarterly basis.

21. CB&I timely filed its California Sales and Use Tax Returns with Defendant Board for ail quarters of each calendar year for the period between the years 1978 through 1982. CB&I

reported its use tax liability to the State of California on the basis of the methods described in this Stipulation and paid the taxes so reported as they fell due.

22. The sales and use tax base and amount of California sales and use tax paid in connection with each quarterly California Sales and Use Tax Return filed by CB&I for the years 1978 through 1982 were as follows:

Calendar Quarter Ending	Sales and Use Tax Base	California Sales and Use Tax Liability
03/31/78	$1,458,524.24	$ 90,168.50
06/30/78	1,161,223.03	70,053.11
09/30/78	1,982,454.75	120,071.72
12/31/78	3,838,822.75	236,431.29
03/31/79	692,304.35	42,892.45
06/30/79	1,864,494.36	114,890.17
09/30/79	2,440,811.16	149,457.67
12/31/79	2,918,302.51	178,302.25
03/31/80	686,618.16	41,423.30
06/30/80	1,434,481.00	87,845.82
09/30/80	2,579,027.00	157,347.05
12/31/80	790,407.00	50,787.74
03/31/81	1,224,107.25	78,264.78
06/30/81	3,727,619.00	238,140.43
09/30/81	820,687.00	52,460.44
12/31/81	2,704,975.01	170,668.60
03/31/82	2,808,269.59	180,046.95
06/30/82	1,437,964.41	93,037.63
09/30/82	844,901.32	54,071.97
12/31/82	3,354,792.02	216,669.20

23. Following an audit of CB&I's Sales and Use Tax Returns filed for the period in issue, Defendant Board determined that the methods used by CB&I to compute its California use tax base on the steel imported into California were incorrect. Defendant Board determined that the use tax base on such steel is equal to the sales price to CB&I of all steel purchased or withdrawn from

inventory for use on California jobs, minus the value of residual steel produced in the fabrication process and sold as scrap. Defendant Board further concluded that the value of the residual steel was equal to the proceeds derived by CB&I on such sales. As a result, Defendant Board determined that CB&I had made a net underpayment of its California use tax liabilities during the period in issue.

24. In support of its position, Defendant Board cited the "short-ends" rule of Regulation 1521(b)(6)(C), 18 *Cal. Ad. Code.*

25. Defendant Board subsequently issued Notices of Determination, pursuant to *Rev. & Tax Code* § 6486, for additional tax, interest and penalties owed by CB&I with respect to the period in issue.

26. CB&I paid in due course to Defendant Board the full amount of the tax deficiencies assesssed for the period in issue as a result of Defendant Board's recomputation of CB&I's use tax base.

27. Thereafter, CB&I timely filed claims for refund with Defendant Board for recovery of the total amount of additional California Use Tax paid on account of the subject deficiencies. A separate claim (attached hereto as Exhibit A) was filed in the following amounts for each of the five years included in the period in issue:

Year	California Use Tax	BART Use Tax	Total Claimed Overpayment
1978	$ 27,307.00	$ 434.00	$ 27,741.00
1979	$ 42,246.01	$1,818.69	$ 44,064.70
1980	$ 26,410.38	$ 389.84	$ 26,800.22
1981	$ 8,342.20	$ 213.36	$ 8,555.56
1982	$ 78,931.09	$5,377.30	$ 84,308.39
TOTALS	$183,236.68	$8,233.19	$191,469.87

Subsequently, CB&I has made a downward adjustment of its refund claim based upon California destination contracts as follows:

Year	Total Claimed Overpayment
1978	$14,872.56
1979	8,734.36
1980	3,396.64
1981	2,034.20
1982	51,884.06
TOTAL	$80,921.82

28. CB&I contends that its method of self-assessing and ascertaining its cost of materials actually imported into the State of California accurately reflects its true cost of the materials stored, used or consumed within the state. CB&I contends further that, based upon its ability to accurately compute the cost to it of materials actually stored, used or consumed in the State of California, and based upon its purchase and resale of residual metal outside the State of California, CB&I's California use tax base should be reduced by the actual cost to CB&I of residual metal rather than the nominal value given such residual metal by Defendant Board.

29. Defendant Board contends, on the other hand, that, insofar as the resale by CB&I of residual metal to third-party scrap dealers outside the State of California warrants an adjustment to CB&I's California use tax base, the base should be reduced by only the dollar amount that CB&I received from the local Utah dealers.

30. The following hypothetical illustrates the differing positions of Defendant Board and CB&I:

	Pounds	Defendant Amount	Plaintiff Amount
Contract Metal			
Volume of steel plate shipped to California erection site	81,000	N/A	N/A
Total cost of contract metal purchased for contract	90,000	$90,000.00	$90,000.00

	Pounds	Defendant Amount	Plaintiff Amount
Less			
Deduction from California use tax base allowed for sale of scrap	9,000	$ 900.00	$90,000.00
Net California use tax base	81,000	$89,100.00	$81,000.00
Total California use tax liability at 6.5%	81,000	$ 5,791.50	$ 5,265.00
Stock Metal			
Use tax paid at 5%	10,000	$ 500.00	$ 500.00
Volume of steel plate shipped to California erection site	9,000	N/A	N/A
Total cost of stock metal allocated to contract	10,000	$10,000.00	$10,000.00
Deduction from California use tax base allowed for sale of scrap metal	1,000	$ 100.00	$ 1,000.00
Net California use tax base	9,000	$ 9,900.00	$ 9,000.00
California use tax at 6.5%	9,000	$ 643.50	$ 585.00
Section 6406 credit allowed for use tax paid outside state of California		$ 500.00	$ 500.00
Total California use tax liability		$ 143.50	$ 85.00
Recapitulation			
California Use Tax Base			
Contract Metal		$89,100.00	$81,000.00
Stock Metal		$ 9,900.00	$ 9,000.00
Total		$99,000.00	$90,000.00
California Tax Paid			
Contract metal		$ 5,791.50	$ 5,265.00
Stock metal includes § 6406 credit)		$ 143.50	$ 85.00
Total		$ 5,935.00	$ 5,350.00
Difference in total California tax liability			$ 585.00

3.1 In sum, the difference in the California use tax base and use tax as determined by Defendant Board and CB&I results from Defendant Board's application of California Administrative Regulation 1521(b)(6)(C) to the residual metal generated during the period in issue at CB&I's Salt Lake City, Utah fabrication plant in connection with contracts involving a field erection site in California.

DATED: May 1, 1990

IVERSON, YOAKUM, PAPIANO & HATCH

By /s/ JOHN M. GARRICK
John M. Garrick
Attorneys for Plaintiff
CHICAGO BRIDGE & IRON

DATED: May 1, 1990

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CHICAGO BRIDGE & IRON COMPANY,
Plaintiff,
v.
BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,
Defendant.

NO. C 712 283

SUMMARY JUDGMENT

The Defendant State Board of Equalization's motion for a summary judgment came on regularly for hearing on May 3, 1990, in Department 52 of the above-entitled Court, before the Honorable Harvey A. Schneider, Judge Presiding. John M. Garrick, Esq., of Iverson, Yoakum, Papiano & Hatch, appeared on behalf of the plaintiff and David S. Chaney, Deputy Attorney General, appeared on behalf of the defendant.

The Court having considered the pleadings, the stipulation of facts and the other documents filed by the parties, and having heard and considered the arguments of counsel, finds that there is no disputed issue of material fact and that summary judgment is

appropriate pursuant to Code of Civil Procedure section 437c. Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED:

1. The imposition of use tax upon the plaintiff by the defendant in accordance with Regulation 1521(b)(6)(C), 18 Cal. Adm. Code, was proper and consistent with California statutes governing the imposition of sales and use taxes and did not violate the due process or commerce clauses of the federal constitution.

2. The plaintiff shall recover nothing by this action.

3. The Defendant shall recover its costs from the plaintiff, in the sum of _____.

Date: June 4, 1990

_____

JUDGE OF THE
SUPERIOR COURT

DECLARATION OF SERVICE BY MAIL

Re: CHICAGO BRIDGE & IRON CO, v. SBE
No. C 426935

I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached

SUMMARY JUDGMENT

on each of the following, by placing same in an envelope(s) addressed as follows:

JOHN M. GARRICK, ESQ.
Iverson, Yoakum, Papiano & Hatch
624 South Grand Avenue, Suite 2700
Los Angeles, California 90017-3328

Each said envelope was then, on May 16, 1990, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 16, 1990, at Los Angeles, California.

Declarant
HILDEGARDA B. DOMANTAY

IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017-3328
(213) 624-7444
Attorneys for Plaintiff
CHICAGO BRIDGE & IRON COMPANY

Plaintiff's Corporate Tax Counsel:

KENT J. SCHIELKE
Tax Counsel
CBI Industries, Inc.
800 Jorie Boulevard
Oak Brook, Illinois 60522-7001
(708) 572-7448

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CHICAGO BRIDGE & IRON COMPANY
a corporation,
Plaintiff,
vs.
BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA,
Defendant.

Case No. C 712,283

**NOTICE OF APPEAL;
NOTICE TO PREPARE
REPORTER'S AND
CLERK'S TRANSCRIPTS**

[Cal. Rules of Court, Rules 1(a), 4(a), 5(a)]

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that plaintiff appeals to the Court of Appeal for the Second Appellate District, from the Order of this Court entered herein on June 4, 1990, in favor of defendant and against plaintiff, granting defendant's motion for summary judgment pursuant to *Code of Civil Procedure* § 437(c).

NOTICE IS FURTHER GIVEN that plaintiff and appellant requests that a reporter's transcript on appeal herein be prepared and include all oral proceedings with regard to the separate motions of plaintiff and defendant for summary judgment, which were heard on May 3, 1990, in Department 52 of the above-entitled Court, before the Honorable Harvey A. Schneider, Judge Presiding.

NOTICE IS FURTHER GIVEN that plaintiff and appellant requests that a clerk's transcript be prepared and designates the following listed papers and records on file or lodged with you to be incorporated in the record on appeal: plaintiff's complaint for recovery of California Use Tax following denial of the claims for refund; notice and acknowledgement of receipt; defendant's answer to complaint; plaintiff's at-issue memorandum; order continuing motion deadline dated February 13, 1990; order extending time to file motions for summary judgment dated March 16, 1990; plaintiff's notice of motion for summary judgment; plaintiff's separate statement of undisputed material facts and supporting evidence in support of motion for summary judgment; plaintiff's points and authorities in support of motion for summary judgment; defendant's separate statement of undisputed facts; defendant's memorandum of points and authorities in support of motion for summary judgment; defendant's separate statement in response to plaintiff's statement of undisputed facts; defendant's points and authorities in opposition to plaintiff's motion for summary judgment; plaintiff's reply points and authorities in support of plaintiff's motion for summary judgment; joint stipulation of facts; notice of ruling on motions for summary judgment dated May 17, 1990; the Court's minute order with respect to motions for summary judgment dated May 3, 1990; order re summary judgment entered June 4, 1990; notice of appeal filed

herewith; and notice to prepare reporter's and clerk's transcripts filed herewith.

DATED: July 5, 1990

IVERSON, YOAKUM,
PAPIANO & HATCH

By JOHN M. GARRICK
John M. Garrick
Attorneys for Plaintiff
CHICAGO BRIDGE & IRON
COMPANY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 624 South Grand Avenue, 27th Floor, Los Angeles, California 90017.

On July 6, 1990 I served the foregoing document described as: NOTICE OF APPEAL; NOTICE TO PREPARE REPORTER'S AND CLERK'S TRANSCRIPTS on interested parties in this action by placing a true copy thereof in sealed envelope(s) addressed as follows:

DAVID S. CHANEY, ESQ.
Deputy Attorney General
Department of Justice
3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010

☒ BY MAIL

☐ I deposited such envelope in the mail at Los Angeles, California.

The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 6, 1990 at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Anna Nix
Name

Signature